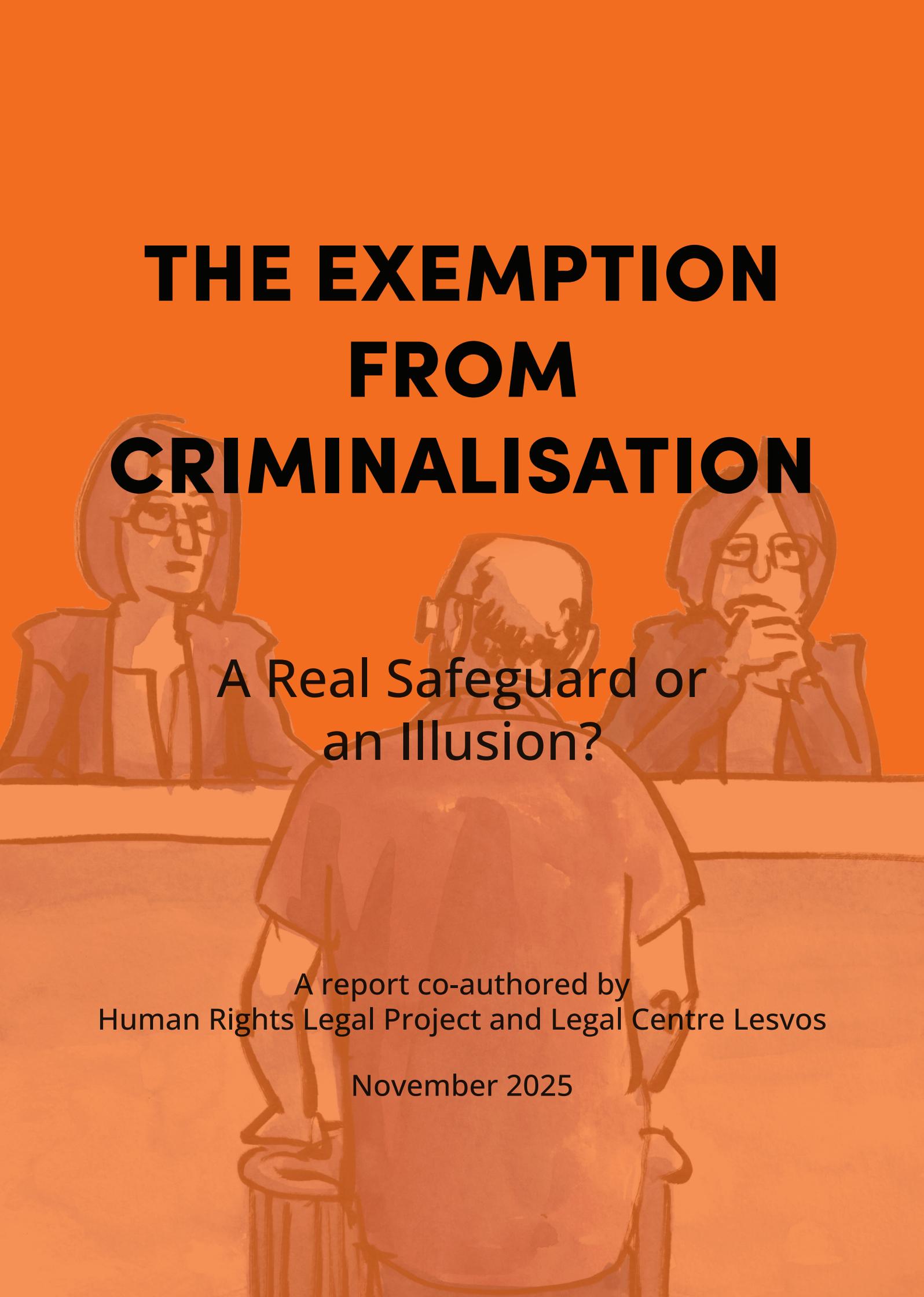


THE EXEMPTION FROM CRIMINALISATION



A Real Safeguard or
an Illusion?

A report co-authored by
Human Rights Legal Project and Legal Centre Lesvos

November 2025

The Exemption from Criminalisation

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an Illusion?

Human Rights Legal Project,
Legal Centre Lesvos,
November 2025

Cover Illustration: Adrian Pourviseh for '0 years' campaign

Supported by Rosa Luxemburg Stiftung Office in Greece



ROSA LUXEMBURG STIFTUNG
OFFICE IN GREECE

1. Executive Summary

When Asghar¹ (represented on appeal by LCL), and Hussein (represented on appeal by HRLP), two men from Afghanistan, boarded a small dinghy to travel from Turkey to Greece in 2020, the Hellenic Coast Guard (HCG) detected the boat and attempted to prevent it from reaching the shore. The HCG pushed the dinghy with metal rods which pierced the rubber tubes and it started to sink. The HCG initiated a rescue operation and took Asghar, Hussein, and the other passengers aboard their ship. Asghar and Hussein were severely beaten by the HCG officers and, once they reached the island of Lesbos, they were arrested and accused of causing the shipwreck.

The next day, the prosecutor of Lesbos formally charged them not only with causing the shipwreck but also with “facilitating the illegal entry” of the other passengers, and ordered their pre-trial detention. There was no evidence against either of the two men, and Asghar’s claim that he had never touched the wheel was ignored. They both waited in pre-trial detention for six-months before their trial took place. At their first instance trial, where they were represented by a state-appointed lawyer, the Lesbos court used written testimonies of HCG officers to convict Asghar and Hussein and sentenced them to 50 years of imprisonment. As migrants who had been forced to use smuggling networks to cross into Greece and seek asylum they should have been exempt from prosecution for smuggling, however, no objection was raised on these grounds.

Almost three years after their arrest, their appeal trial was held, where they were represented by lawyers from LCL and the HRLP. In that trial, held in December 2022 in Lesbos, an objection was raised as to the prosecution of the two men, who were both asylum seekers. The court rejected the objection and went on to convict Hussein of smuggling as he had admitted to steering the boat, but acquitted him of causing a shipwreck. Asghar was acquitted of all charges, not because the court found that he was exempt from prosecution, but because there was no evidence against him.²

Asghar and Hussein’s story is not an isolated case of injustice. Thousands of people on the move³ face a similar fate in Greece. Every week, in trials that often last less than an hour, migrants are convicted on smuggling-related charges and sentenced to an average of 46 years in prison.⁴ As of September 2025, 2,437 people are serving sentences or are in pre-trial detention on smuggling charges.⁵ In 2024, at least 228 people were

1 All names and identifying details of persons mentioned in this report are changed.

2 Decision no. 132/2022

3 We use the terms “migrant” or “people on the move” throughout this report as an umbrella term to include all individuals who are forced to and choose to migrate and/or seek asylum, regardless of what legal status they have or are eventually granted by the state in which they reside. We use the terms “migrant” and “people on the move” interchangeably and to counter increasing anti-migrant narratives that attempt to categorise those who are not afforded refugee status by law as “irregular” or “illegal” migrants somehow undeserving of human rights. The terms “asylum seeker” and “refugee” are used here in reference to individuals’ particular legal status, when relevant.

4 A Legal Vacuum - The Systematic Criminalisation Of Migrants For Driving A Boat Or Car To Greece, Borderline Europe, 2023, <https://www.borderline-europe.de/sites/default/files/readingtips/criminalisation_of_migrants-study_by_borderline_europe_en.pdf>.

5 Data by Hellenic Ministry of Citizen Protection received through Freedom of Information Request

arrested with smuggling charges,⁶ However, this number is widely underestimated as it relies on media reviews. Out of all people imprisoned in Greece on illegal transfer charges, 28.8% of them are still waiting for their first instance trial, making them the second largest population of detainees after those serving sentences of 15 years or more.⁷

1.1. Who We Are

This report is authored by Human Rights Legal Project (HRLP) operating on Samos and Legal Centre Lesvos (LCL) operating on Lesvos, with funding from the Rosa-Luxemburg Foundation. For several years, both LCL and HRLP have been active in supporting, representing and defending migrants for smuggling-related charges.

HRLP is a legal aid organisation defending the fundamental rights of people on the move in Greece, and seeking accountability for state criminality at the European Union (EU) border. The HRLP challenges the systemic and individual human rights abuses that fall outside of the asylum process, including the criminalisation of asylum seekers, pushbacks, arbitrary detention, and denial of access to healthcare. HRLP is committed to meeting the needs of these individual cases, while in parallel working to address the systemic failures of the Greek justice system and EU migration policy.

Since 2016, LCL has provided free legal aid to migrants who arrived by sea to Lesvos, including the representation of criminalised migrants. Besides this continuous and direct support, the Legal Centre also works towards collective justice and structural change as part of local and international movements: documenting violations of migrants' rights and engaging in advocacy and strategic litigation to hold the Greek government, Member States of the EU, and European institutions to account. In addition, LCL advocates for equal access to safe and legal routes of migration in Greece, Europe and globally.

6 Picum, 2024, Criminalisation of migration and solidarity in the EU - 2024 Report, <<https://picum.org/wp-content/uploads/2025/04/Criminalisation-of-migration-and-solidarity-in-the-EU-2024-report.pdf>>.

7 Calculated from data provided by the Hellenic Ministry of Citizen Protection received through Freedom of Information Request.

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2. Background and Political Context

Migrants who enter Greece from outside the European Union (EU) usually travel in rubber boats when crossing the maritime borders to reach Greek islands, or by car following the crossing of the Evros river at the land border. Both scenarios are extremely perilous, and over 1,600 people have died trying to cross the Eastern Aegean since 2015.⁸ In the overwhelming majority of cases, migrants cross the border on their own meaning that they must steer the boat or drive the car themselves. As reported by people on the move, the smuggling networks usually organize the crossing and its logistics, but the members of smuggling networks themselves do not board the dinghies or they leave the boats before reaching Greek territorial waters. Numerous people who were prosecuted as smugglers upon arrival in Greece reported that they were forced to steer the boat or drive the car. Coercion took various forms: multiple drivers were forced at gun point to steer boats by members of smuggling networks, while others had to steer the boat when they couldn't pay, or could pay only a reduced price (which usually ranges from several hundred euro to thousands of euro, according to reports from people on the move). In other cases, people had to steer the boat out of necessity after being abandoned at sea without a driver.

The systemic policy of prosecuting migrants for smuggling is inseparable from Greece's systematic policy of attacking migrant boats in a widespread clandestine and unlawful pushback policy. When migrant boats are not pushed back towards Turkey, migrant boats are often still violently intercepted by the Hellenic Coast Guard vessels at high sea. In an apparent attempt to cover up the HCG's own violence towards migrants, people on board are then charged themselves with either smuggling or causing a shipwreck.⁹

The policy of criminalising migrants is also inseparable from the EU's exclusionary and discriminatory migration policy, which forces people on the move to resort to smuggling networks to enter the EU.

Prosecuting migrants for smuggling themselves across a border defeats the very purpose of international

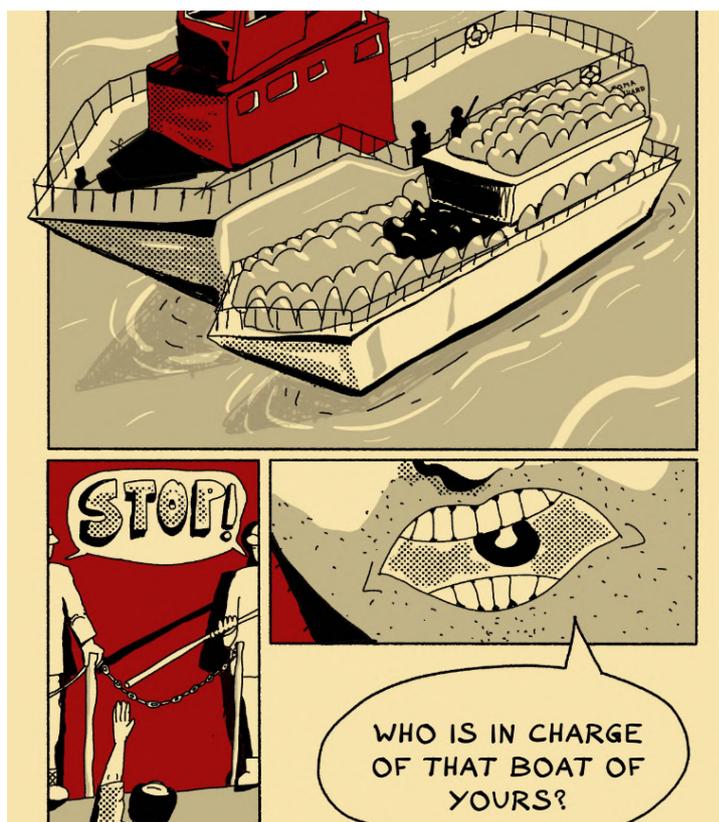


Illustration: Patrick Muczzek for '0 years' campaign

8 Refugee Support Aegean, Border Deaths, <<https://rsaegean.org/en/death-at-border/>>.

9 Because the crime of causing a shipwreck is not considered related to the unlawful entry into Greece, the exemption clause cannot be raised as a defense, leading many migrants to continue to be prosecuted and convicted for alleged crimes that are inseparable from their entry to Greece. As this report focuses on the application of the exemption clause, we will not go into detail regarding the cases in which migrants are charged with causing shipwrecks upon their entry to Greece, unless they were also charged with smuggling offenses.

protection regimes. *However, the increasing militarisation of the border areas, as well as public discourse conflating human trafficking with smuggling and threats to public order actively undermine the safeguards that were developed against the criminalisation of migration.*

This report, through an examination of case studies from the work of HRLP and LCL, and trials monitored by partner organisations, exposes how Greek authorities are weaponising counter-smuggling legislation to prosecute the very people that both the Convention Relating to the Status of Refugees (the Refugee Convention) and anti-smuggling legislation are purported to protect.

3. Legal Framework

In this report, “criminalisation” of migrants refers to the instrumentalisation and misuse of criminal law, and in particular “counter-smuggling” legislation, by the authorities to prosecute people crossing EU external borders without legal authorisation.

Illegal transfer of third country nationals or facilitation of illegal entry, commonly known as ‘smuggling of migrants’ are criminal offences under international and Greek law.

3.1. Anti-Smuggling Legislation - International and Greek Frameworks

3.1.1. UN Protocol Against the Smuggling of Migrants by Land, Sea and Air

The UN Protocol Against the Smuggling of Migrants by Land, Sea and Air (Palermo Protocol) aims to criminalise the smuggling of migrants, while at the same time protecting the rights of migrants.¹⁰ Smuggling is defined as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.”¹¹ In particular, according to the Palermo Protocol, State Parties must prosecute the smuggling of migrants as a criminal offence, “when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit”.¹² The material benefit criterion alone should protect migrants who smuggle themselves across borders from criminal prosecution, as they receive no material benefit. However, the Protocol goes a step further, and explicitly states that migrants whose border crossing is facilitated by smugglers as defined by the Protocol “shall not become liable to criminal prosecution.”¹³

3.1.2. EU Facilitators Package

Despite the clear exemptions included in the Palermo Protocol, the EU has adopted a much broader and vague definition of smuggling. The Protocol is the basis of the ‘Facilitators Package’, consisting of EU Directive 2002/90/EC (hereinafter ‘Facilitation Directive’) and Framework Decision 2002/946/JHA, adopted in 2002, which mandated all Member States to create legislation that make it a criminal offence for anyone to provide any assistance to a person in entering or transiting through the territory of an EU Member State in breach of national law. **The requirement that this assistance**

10 Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, <https://www.unodc.org/documents/middle-eastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf>.

11 Ibid, Article 3 (a).

12 Ibid, Article 6.

13 Ibid, Article 5.

is provided for material gain was however removed from the European definition, as was the exemption for migrants who are themselves smuggled across borders. This deliberate deviation from the Palermo Protocol has made it significantly easier for Member States to criminalise people who smuggle themselves across borders and the exemption clause is not in the same Directive defining the criminal offense, but only in Article 6 of the Framework Decision, which requires Member States to uphold the protections guaranteed in the Refugee Convention.

3.1.3. Greek Anti-Smuggling Provisions

In transposing the EU Directives into Greek law, in addition to criminalising the facilitation of unauthorised entry and transfer, Greek law also criminalizes the facilitation of illegal stay of third-country nationals on Greek territory. In line with the Facilitation Directive, financial or material gain are not an element of the offense itself, but rather are only considered an aggravating circumstance to it. All three offences are punishable under Law 5038/2023 (the Migration Code).¹⁴ **Crucially, the definition is broad and vague, leaving significant margin of interpretation to courts.** Smuggling offences are punished with the most serious penalties foreseen by Greek criminal procedure, as sentences are multiplied based on the number of persons whose movement across or within borders were 'facilitated' by the alleged perpetrator - in practice, by the number of passengers in the vessel or vehicle. Penalties for illegal transfer range up to 10 years' imprisonment per person transferred, rising to at least 10 years in cases committed for profit and at least 15 years in cases involving endangerment of life. Sentences may reach life imprisonment where death occurs.¹⁵ Sentences often are higher than 100 years, of which 25 years have to be served with early release possible only after $\frac{2}{5}$ or $\frac{3}{5}$ of time served, depending on whether it was a misdemeanor (Filakisi), or felony (Kathirxi) sentence, respectively.

As of September 2025, 45.8% of individuals imprisoned in Greece for illegal transfer were serving sentences ranging from 15 years to life imprisonment.¹⁶ 31.6% of the detainees are serving sentences of 5 to 10 years.¹⁷

In line with the EU Directives, there is no exemption from prosecution in Greek law for migrants who are forced to resort to smuggling networks to facilitate their border crossing, as provided for in the Palermo Protocol. However, Article 383 (e) of the Migration Code provides that:

The provisions of this Code shall not apply to: ... e. beneficiaries of international protection ... and applicants for international protection within the meaning of the 1951 Geneva Convention relating to the Status of Refugees."
Law 5038/2023, Article 3.

¹⁴ Article 25 for illegal transfer (Previously Article 30 of Law 4251/2014); Article 24 for facilitation of illegal transfer and illegal stay (Previously Article 29 of Law 4251/2014)

¹⁵ Ibid.

¹⁶ This represents people imprisoned on felony (Kathirxi) smuggling charges (Article 52 of the Criminal Code) - Calculated from data provided by the Hellenic Ministry of Citizen Protection obtained through a Freedom of information request.

¹⁷ This represents people imprisoned on misdemeanor (Filakisi) smuggling charges (article 53 of the Criminal Code). - Ibid.

Within the Migration Code are Greece' anti-smuggling codes (Law 5038/2023, Articles 24-25). The exemption thus precludes the application of the anti-smuggling code to asylum seekers and refugees. This exemption has been included in the different versions of Greece's Migration Code, which indicates the legislature's continued intent to provide exemption of criminal liability for individuals transporting themselves.¹⁸

Article 3(3) of the Migration Code, hereinafter referred to as the "exemption clause", is a transposition of Article 31 of the Refugee Convention, discussed in more detail below, which also specifies that refugees should not be penalised for their unlawful entry into a country.

It is therefore clear from the letter of the Greek law, that both asylum seekers (applicants for international protection) and recognized refugees (beneficiaries of international protection) should not be criminally prosecuted for smuggling themselves across borders or within Greece.

3.2. Legal Distinction between smuggling and human trafficking

Before we go into additional safeguards protecting refugees and migrants from prosecution as smugglers, it is important to emphasise that smuggling and trafficking are two separate criminal offenses, with two separate legal meanings.¹⁹ Human trafficking is "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion [...], for the purpose of exploitation".²⁰ Smuggling is often conflated with human trafficking and portrayed within public discourse as both the exploitation and abuse of people fleeing across borders, and as a threat to the sovereignty of a State.

However, smuggling of migrants, as discussed above, consists simply of facilitating the illegal entry, transit or stay of a person across borders. Unlike human trafficking, *it is not a crime against an individual. Trafficking inherently involves both exploitation of the people being trafficked, and the use of coercion, threats or violence, whereas these are not elements of the crime of smuggling.*²¹ While it is undeniable that



Photo: Things left behind after a landing

18 Previously Article 2§1 (c) of Law 4251/2014.

19 Interpol, Human Trafficking and Migrant Smuggling, <<https://www.interpol.int/en/Crimes/Human-trafficking-and-migrant-smuggling>>.

20 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, Article 3.

21 United Nations Network on Migration, Mapping the Landscape of the Smuggling of Migrants: An Overview of Key Concepts, Trends, Challenges and Areas for Action, <https://migrationnetwork.un.org/system/files/resources_files/Mapping%20the%20Landscape%20of%20the%20Smuggling%20of%20Migrants_Final.pdf>.

some smuggling networks use force, coercion, and exploitation, these acts are not inherent to the legal definition of the crime of smuggling itself under the Greek and international definitions.

The conflation of the two terms not only demonizes the accused smuggler, but also fails to consider the context in which people are forced to cross borders into Europe, wherein people resort to smuggling networks as the only means to facilitate their crossing of increasingly militarised and hostile borders. In the absence of nondiscriminatory migration laws that would allow people to cross borders safely and legally, regardless of their nationality, smuggling networks will continue to exist. The deliberate conflation between trafficking and smuggling, particularly when migrants are criminalised for facilitating their own movement, reinforces anti-migrant narratives that portray migrants, especially migrant men, as violent criminal threats.

3.3. Additional Safeguards under International law

The protection against criminalisation for people fleeing across borders without permission was enshrined as early as 1951, in the Refugee Convention, which was drafted in the aftermath of the Second World War.

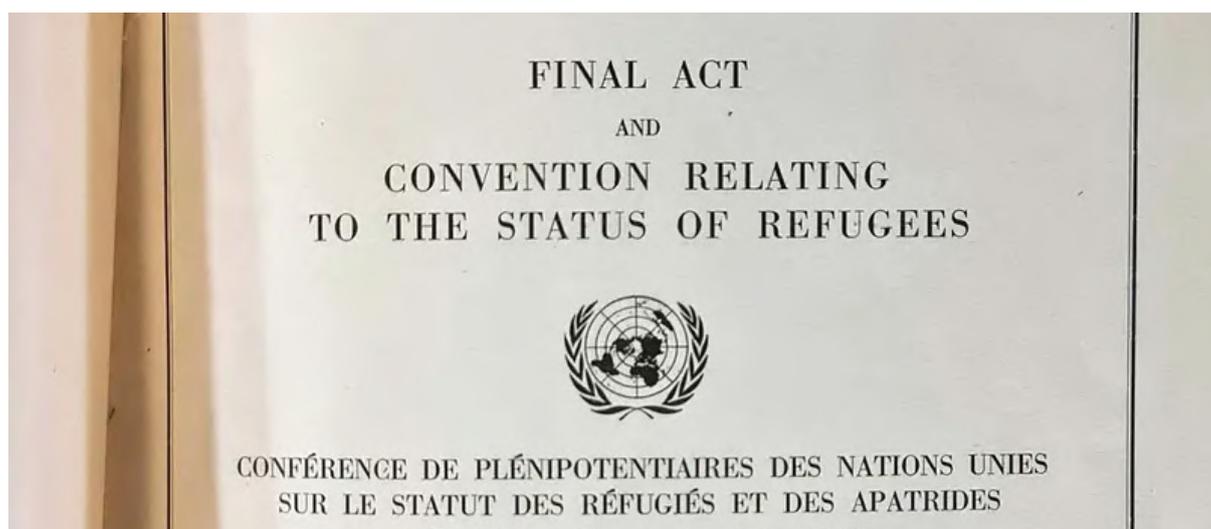


Photo: Original Document of the Refugee Convention

Article 31 of the Convention provides that:

*"The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."*²²

22 Article 31 Refugee Convention

The drafters of the Convention foresaw that **a person fleeing their country of origin can seldom comply with visa procedures or other entry formalities**. In the published commentary on the Refugee Convention by Dr. Paul Weis, who played an active part in the drafting of the Refugee Convention, he clarifies that:

“The term ‘coming directly’ [in Article 31] refers, of course, to persons who have come directly from their country of origin or a country where their life or freedom was threatened, **but also the persons who have been in an intermediary country for a short time without having received asylum there.**”²³

Therefore, refugees of any nationality entering Greece from Turkey or Libya without authorization - where they have presumably stayed only a short time without having received asylum - are thus exempted from criminal prosecution, if they present themselves to the authorities without delay in order to apply for international protection.

Article 31 of the Convention forms the basic safeguard designed to protect refugees crossing into State Parties from criminal prosecution. As indicated with the later adoption of the UN Palermo Protocol, this protection extends as well to all migrants subjected to smuggling networks to cross borders. This expanded protection was recognized by the Greek state, with the transposition of Article 31 into Greek law, **which applies this exemption to all asylum seekers, not only recognized refugees, independently from the outcome of the asylum procedure.**

In the 3 June 2025 Kinsa judgement,²⁴ the Court of Justice of the European Union (CJEU) made a crucial ruling, clarifying just this: that people who smuggle themselves and their family members across borders in order to seek asylum fall within the exemption from prosecution for smuggling as enshrined in the abovementioned binding international law.²⁵

The Kinsa case - trial of O.B., a Congolese woman, who arrived in Italy in August 2019 accompanied by her 8-year-old daughter and 13-year-old niece, using false passports to travel to Italy to seek protection. O.B. was arrested and charged with ‘facilitating’ the unauthorized immigration of the two girls. Her lawyer requested a preliminary hearing before the CJEU regarding the validity and interpretation of the EU Facilitators Package, as well as the Italian law implementing it, with regard to the EU Charter for Fundamental Rights²⁶. Following the CJEU ruling, all criminal charges were dropped against O.B.

In particular, the CJEU ruled that anti-smuggling and migration legislation²⁷ must be applied in line with fundamental rights guaranteed in the EU charter, in this case invoking the right to asylum, to family life, and the best interests of the child. The Kinsa ruling should have marked a pivotal change in Member States’ judicial practices, given the systematic prosecution of migrants as smugglers.

This report will show, however, that both before and after the Kinsa judgment, Greek Courts consistently interpret Greek legislation in a way that conflicts with both the Geneva Convention and Palermo Protocol, by applying the exemption clause provided for under Article 3(3)(e) of the Migration Code only sporadically and inconsistently.

23 The Refugee Convention, 1951, The Travaux Préparatoires Analysed with a Commentary by Dr Paul Weis <<https://www.unhcr.org/media/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul-weis>>.

24 Court of Justice of the European Union C-460/23.

25 All EU Member States are part of the Geneva Convention and the Palermo Protocol.

26 The Kinsa Case <<https://kinsa-case.eu/the-case-kinsa>>.

27 In particular the Facilitator Directive, Directive 2002/90, Framework Decision 2002/946 and the Schengen code.

As a result, thousands of migrants, asylum seekers and refugees in Greece end up convicted and imprisoned with smuggling offenses, when they should be exempt from prosecution under the clear letter of the law.

4. The arbitrary and inconsistent application of the exemption clause by Greek jurisdictions

Trials of migrants accused of smuggling following their crossing into Greece are held before criminal courts throughout the country, with a predominance in the border areas: the islands of the Dodecanese (Kos and Rhodos), Northern and Southern Aegean (Lesvos, Chios, Syros, Samos), Crete and in Northern Greece, close to the Evros border. In recent years, Greek courts have been applying the exemption clause rarely and inconsistently. Recent trends suggest that there tends to be a wider acceptance of the exemption clause in cases where the defendant is a recognized refugee or for asylum seekers with a 'refugee profile'. However, even this is unpredictable, as acceptance varies greatly between places, judges, and dates in violation of the principle of legal certainty and equality before the law.

While the principles of legal certainty and impartiality are supposed to protect individuals from the arbitrary application of the law, courts across Greece either systematically reject the exemption clause, or apply it inconsistently. This arbitrary application of the law further contributes to the erosion of the rule of law in Greece.²⁸

As this report is limited in scope to our two organisations' work, we will only examine cases where our organisations have directly documented court practices while representing defendants, or where we or partner organisations have monitored other trials.

4.1. Non-invocation of the exemption clause

Most courts throughout Greece, in the cases examined by the HRLP and LCL, have rejected objections raised by the defence to the prosecution of asylum seekers and refugees under the exemption clause. The cases in which it is raised, however, are only a small sample of the smuggling prosecutions in Greece.

Even in cases where the objection to prosecution based on the exemption clause is not raised during the hearing by the defence, the Court, at its own discretion, may invoke the exemption clause. **Nevertheless, there is no known case of a Greek court having acquitted defendants based on the exemption clause when the objection under this exemption clause was not raised by the defence.**

As a procedural matter, the defence must raise the objection to prosecution under the exemption clause during their opening statement. However we have observed in cases that we and partner organisations have monitored that many lawyers do not raise this objection. In some cases, lawyers strategically choose not to raise the objection if they assess that it will be negatively perceived by the judge, for example

28 The erosion of the Rule of Law in Greece has been largely documented. See for example : Greek Council for Refugees, Hellenic League for Human Rights, HIAS Greece, Homo Digitalis, Refugee Support Aegean, Reporters United, Solomon, Vouliwatch, Struggle for Accountability, The State of the Rule of Law in Greece, January 2025, <<https://rsaegean.org/en/the-state-of-the-rule-of-law-in-greece/>>.

in cases where the defendant is technically still an asylum seeker, but whose claim for asylum has been rejected and he has appealed, or when the asylum seeker is from a country that Greece considers to be a “safe country of origin”. While technically, the exemption clause should still apply to all asylum seekers, the defence may instead strategically decide to focus on other lines of defence, such as lack of translation, lack of jurisdiction, or lack of evidence, rather than potentially open up the criminal trial to an irrelevant assessment of the defendants’ eligibility for asylum.

Numerous lawyers also favour plea bargaining, rather than proceeding to a full trial, if they assess it is in the best interest of their client to accept a plea deal rather than face a possible conviction with harsher penalties, in which case the objection to prosecution based on the exemption clause cannot be raised.

4.1.1. Plea Bargaining

The practice of **plea bargaining** allows defendants to negotiate a reduced sentence with the Public Prosecutor in exchange for their admission of guilt.²⁹ The introduction of plea bargaining to Greek criminal procedure in 2019 has led to many defendants charged with smuggling to plead guilty, rather than raise any legal objections to their prosecution, such as the exemption clause. **Plea deals can often seem like the best viable option for many defendants, due to the fact that (1) smuggling charges carry the among the heaviest sentences foreseen in Greek criminal law, (2) most defendants are held in pre-trial detention awaiting trial (3) access to legal aid prior to the trial is limited, and (4) and smuggling cases have very high conviction rates.**

In 2023, Borderline Europe analysed 81 trials conducted throughout Greece of asylum-seekers charged with smuggling. Out of the 25 cases documented that were settled through plea deals, 24 of them took place in Greece’s northern border region, in Komotini, before the Single-Member Criminal Appeal Court of Thrace.³⁰ In Komotini, plea deals are the standard as trials without plea deals usually result in guilty sentences with maximum penalties.

Through their trial monitoring in Crete, the Border Violence Monitoring Network (BVMN) observed that plea bargaining is also becoming the norm in Crete. In particular, in the Court of Chania, most cases are concluded via plea deals with a standard penalty of 10 years of imprisonment imposed. BVMN noted that plea bargains were presented by some defence lawyers as the only realistic option to defendants, the majority of whom were represented by state appointed lawyers, assigned shortly before the hearing or on the same day. It has been observed by partner organisations that said lawyers often to use **plea bargain as the default course of action, without considering jointly with the defendants the possibility of a proper hearing**³¹.

On 22 September 2025, BVMN witnessed first-hand when some state appointed lawyers explained to their clients that because they drove the boat, they were guilty and would spend hundreds of years in prison, without mentioning the possible exemption as asylum seekers, or explaining how sentencing works in Greek jurisdiction. In these cases it was observed that the clients opted, based on this advice, to accept a plea deal.³²

29 Plea bargaining is foreseen in Greek law in Article 303 of the Greek Code of Criminal Procedure (as amended recently by article 94 of Law 5090/2024).

30 See footnote 4, *A Legal Vacuum*, page 43.

31 Border Violence Monitoring Network, Crete Trials Monitoring, 16 July 2025, <<https://borderviolence.eu/reports/crete-trials-monitoring-16-july-2025>>.

32 Border Violence Monitoring Network, Crete Trials Monitoring, 22 September 2025, <<https://borderviolence.eu/reports/crete-trials-monitoring-22-september-2025>>.

BVMN monitored trials at the Court of Chania on the 7 and 16 of July 2025, and 1 September 2025. Out of 47 cases, including 86 defendants, 4 cases proceeded to trial, 15 were concluded via plea bargaining and the 27 other cases were postponed.³³

Smuggling cases are rarely resolved through plea bargaining in Samos and Rhodos, and, to the best of our knowledge, never before the Court of Lesbos.

4.2. Rejection of the exemption clause throughout Greece

As of October 2025, there are no known cases of acceptance of the exemption clause by any Court outside of Crete and Samos. The case studies below are not comprehensive of all the trials in which the defence was raised, but are included in order to illustrate different courts' approach to the defence raising an objection to prosecution on this ground.

4.2.1. Thessaloniki

The Court of Thessaloniki seldom examines smuggling charges brought against migrants and asylum-seekers, as the majority of arrests for smuggling take place in the border areas. However, in the case of **Homayoun Sebatara**, which gathered international attention through the Free Homayoun campaign³⁴, the Court of Thessaloniki had the opportunity to lead by example. Unfortunately, it did not. Instead, it



Photo: **Homayoun Sabatera** after his release from prison

33 Border Violence Monitoring Network, Crete Trials Monitoring, 7 July 2025 <<https://borderviolence.eu/reports/crete-trials-monitoring-7-july-2025>>; See footnote 31, *Crete Trials Monitoring*, 16 July 2025; Border Violence Monitoring Network, Crete Trials Monitoring, 1 September 2025, <<https://borderviolence.eu/reports/crete-trials-monitoring-1-september-2025>>.

34 Free Homayoun Campaign, <<https://www.freehomayoun.org/en>>.

conducted a trial marred by multiple violations of the fair trial standards in addition to the inherent unfairness of the charges brought against Sebatara, “who should never have been prosecuted in the first place as he came to Greece to apply for asylum”.³⁵

Homayoun Sebatara was arrested in August 2021 after driving a vehicle across the Turkish-Greek land border, in order to apply for international protection. He was detained upon arrest³⁶. In September 2022, in the first instance trial, the Single-Judge Court of Thessaloniki found him guilty of illegally transferring seven third-country nationals into Greece, for profit and in a hazardous manner. He was sentenced to 18 years of imprisonment³⁷. After the first instance trial, Sebatara applied for international protection from prison. His appeal trial took place in September 2024 before the Three-Member Court. The defence invoked the exemption clause. It was refuted by the Prosecutor who argued that, because the offence [driving the vehicle into Greece] was committed before Sebatara applied for asylum in Greece, he could not be exempted from prosecution. The Court rejected the exemption clause and found him guilty of illegal transfer of third-country nationals into Greece but dropped the aggravating circumstances. His sentence was lowered only one year, from 18 to 17 years of imprisonment³⁸. Sabetara’s case was heard before Greece’s Supreme Court, Areios Pagos, on 19 September 2025, where again the objection to prosecution of Homayoun as an asylum seeker under the exemption clause was raised. The Court will issue a ruling in the next months, and could set an important precedent for future smuggling prosecutions throughout Greece³⁹.

4.2.2. Rhodes

There is no known decision in which the Appeals Court of the Dodecanese⁴⁰ has acquitted an asylum-seeker or a beneficiary of international protection accused of smuggling-related crimes on the basis of the exemption clause.

35 Border Violence Monitoring Network (BVMN), European Lawyers for Democracy and Human Rights (ELDH), Feminist Autonomous Center for Research (FAC), Legal Centre Lesbos (LCL), The Undermining of Fair Trial Safeguards in the Trial of Homayoun Sabetara, <<https://borderviolence.eu/reports/the-undermining-of-fair-trial-safeguards-in-the-trial-of-homayoun-sabetara>>.

36 See footnote 34.

37 See footnote 35.

38 Ibid.

39 See footnote 34.

40 The islands of Kos, Leros, Rhodes and Chios are in the jurisdiction of the Court of Appeal of the Dodecanese.

In July 2025, Equal Rights Beyond Borders (ERBB) represented in first instance a Syrian asylum seeker who was tried before the One-Member Court of the Dodecanese. The defence lawyer raised the exemption clause, as the defendant had applied for asylum during his pre-trial detention. The court rejected the objection to his prosecution and found him guilty of facilitation of illegal entry and illegal entry, sentencing him to 11 years and 1 month of imprisonment and a 12,000 euro fine.⁴¹ He has appealed the conviction, however, the appeal trial has not yet been scheduled. An examination of this case on appeal will be an *opportunity for the Three Member Court of the Dodecannese to examine the application of the exemption clause for asylum seekers prosecuted for smuggling.*

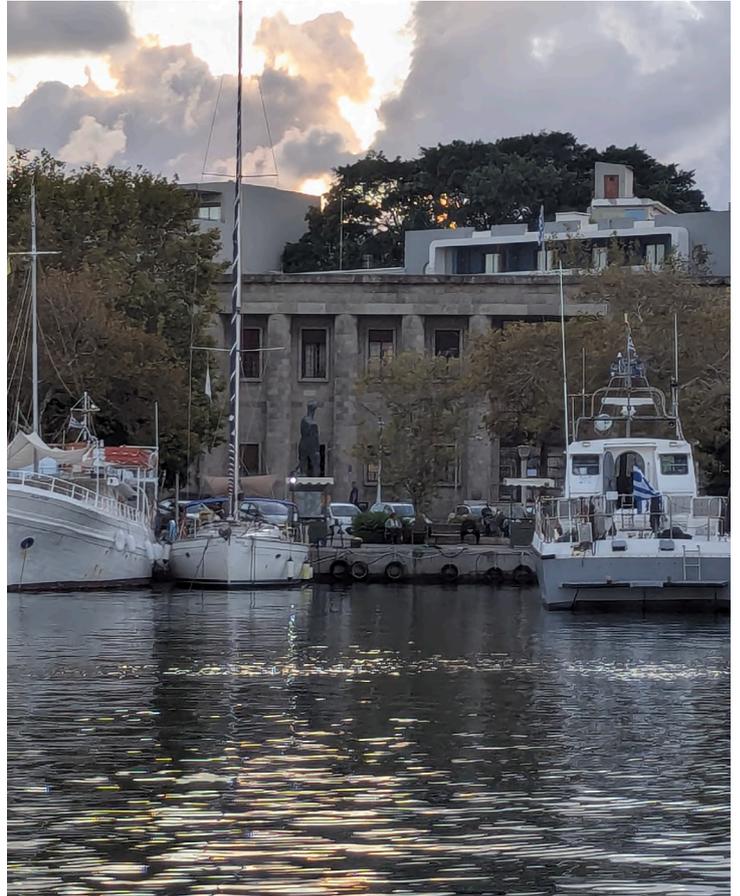


Photo: Appeals Court of the Dodecanese

41 Decision no. 223/2025.

In **October 2025**, the One-Member Court of the Dodecanese heard the case of two Syrian nationals who were accused of illegal transport, and illegal entry. They had both applied for asylum in Greece and were detained for a year and a half before their first instance trial. During the trial, their lawyer argued that they should both be acquitted on the basis of the exemption clause. The prosecutor disagreed, arguing that the exemption clause did not apply to the illegal transport but only to the illegal entry, despite both criminal offences coming from the Migration Code, to which the exemption clause applies. The judges ultimately rejected the objection without giving any reasoning. However, in the absence of sufficient evidence, both defendants were acquitted of the more serious smuggling charge of illegal transfer. On the same day, however, the same judge convicted twelve other defendants who faced the same charges. The only notable difference between these cases was that, in the case of the men who were ultimately acquitted, their lawyer had invoked the exemption clause, indicating that even though the objection on this ground was rejected by the court, it may still have played a role in securing the defendants' ultimate acquittal.

4.2.3. Lesvos

In the numerous trials of 'boat drivers' taking place before the Court of Mytilene, in Lesvos island, the reporting organisations **are not aware of any case in which the Court of Lesvos accepted the objection to the prosecution of asylum seekers or refugees under the exemption clause.**

In 2025, the Legal Centre Lesvos represented three defendants who were charged with smuggling in three separate trials. In the two cases where the exemption clause was raised, the court rejected the objection, but acquitted the defendants on other grounds. One of these cases was tried in February 2025, and the other in September 2025, after the Kinsa judgement. In the third case, because the defendant had received a rejection on his asylum claim shortly prior to his trial, the exemption clause was not raised.

In the two cases in which the exemption clause was raised as an objection, we have been unable to examine the Court's reasoning for rejecting this objection as thankfully the defendants were acquitted on other grounds. In these cases, where the written judgement was available, the objection was either not referenced at all or was explicitly rejected but without the legal reasoning.

Hassan (represented by LCL), an Iraqi national, was arrested in March 2020 and accused of facilitating illegal entry and illegal entry, even though a video showing him as a mere passenger of the boat, not the driver, was presented to the investigative judge. Hassan was not held in pre-trial detention. For over five years, his case was repeatedly postponed. **In addition to the potential life-sentence hanging over him, his asylum procedure was suspended for years due to his pending criminal charges.** Only after intervention of his lawyer, was a decision issued, in early 2025. Unfortunately, after a nearly 5 year wait, his asylum claim was rejected. After multiple postponements, at his smuggling trial in **March 2025**, his lawyer decided strategically not to raise an objection based on the exemption clause, both because Hassan had just recently had his asylum case rejected (although his case was on appeal and he was still technically an asylum seeker), and because there was ample evidence to show that Hassan was not guilty. Hassan was acquitted of all charges.⁴²

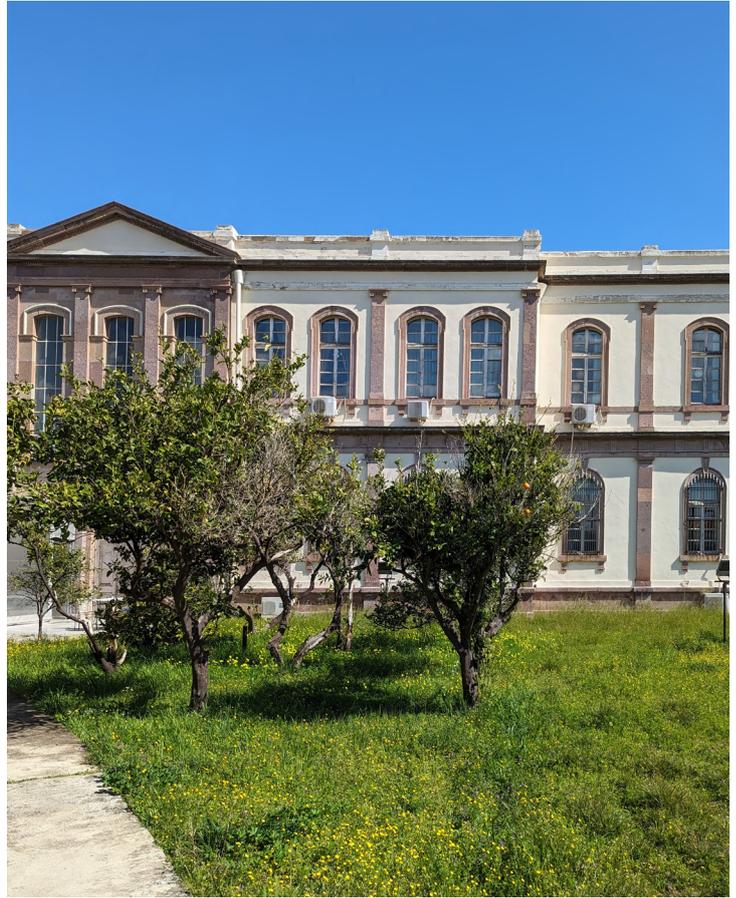


Photo: Court of Mytilene

42 Decision no. 26/2025.

In September 2024, while attempting to reach Greece, Naser (represented by LCL) and 24 other people onboard a small rubber boat were attacked by a HCG vessel. Testimonies of the passengers taken during the investigation, and read during the trial, revealed that the coast guard fired live ammunition, rammed the dinghy—causing it to capsize—and, after taking everyone on board, proceeded to severely beat them. Naser was hit so severely that he was covered in blood and bruises, and disfigured from the beatings. Two witnesses testified that Naser had not been driving the boat throughout the journey but only grabbed the wheel following the attack in order to reduce the boat’s speed and stabilise it. Naser was charged with unauthorized transfer of foreigners, causing a shipwreck, and disobedience. The investigative judge ordered his pre-trial detention. During his trial in **January 2025**, the defense argued that, as a Palestinian asylum-seeker from Gaza, he should be exempt from criminal prosecution. The Court rejected the objection without detailing its reasoning.⁴³ Fortunately, Naser was acquitted of all charges as his guilt had not been proven. Significantly, the case was also referred to the Naval Court Prosecutor to investigate the actions of the coast guard officers for potential charges of torture and serious bodily harm.

Also in September 2024, Mohammad (represented by LCL), also Palestinian, was arrested and charged with facilitating the unauthorised entry of 34 people to Greece. He and two others were also charged with causing a shipwreck, despite the fact that the migrant boat that was intercepted by the HCG had not capsized. Mohamad was not put in pre-trial detention, and by the time of his trial, in **September 2025**, he was a recognized refugee. The defence raised an objection under the exemption clause, however, the Court did not address this objection, even though Mohammad was a recognized refugee.⁴⁴ Due to evidence presented by the defence contradicting the Coast Guard witness’ testimony, Mohammad and his codefendants were acquitted.

The **December 2022** appeal trial of Asghar and Hussein, discussed in the introduction, further evidences the Lesvos Court’s dismissal of the exemption clause when raised.

After monitoring dozens of trials, many in Lesvos, the Community Peacemaker Team, Aegean Migrant Solidarity Programme (CPT/AMS) identified *‘doubt of fulfilling the elements of an offense’* as the most common ground for acquittal of the defendants. This indicates that the exemption clause is, in general, not being applied, even in cases of acquittal.

Unfortunately, despite a clear provision in the law, most courts simply ignore the exemption clause when prosecuting asylum seekers and refugees. For this reason, a successful defense must rely on a multitude of other elements, including arranging for witnesses to appear in court to counter the prosecution’s witnesses and narrative. Many acquittals are achieved due to the prosecution’s reliance on coast guard or police witnesses, who often do not show up in court, or who provide unreliable testimony.

Witnesses of the defence, usually family members of the defendant or migrants traveling on the same boat from Turkey, are usually only called to testify when lawyers working in non-profit organisations or privately-appointed lawyers represent the

43 Decision no. 04/2025.

44 Decision no. 54/2025, the full written judgement is still pending.

defendant, as they have had time to prepare for trial. As state-appointed lawyers are often appointed the same day as the trial, this preparation is impossible. Out of all the trials they monitored, CPT/AMS only monitored one trial in which a state-appointed lawyer requested a postponement of a couple of days in order to prepare her client's defence, following her last minute appointment by the Court.

4.3. Courts of Arbitrary “Justice” - the examples of Samos and Crete

While most courts disregard the exemption clause, those on Samos and in Crete have occasionally applied it. However, in both islands, **the Courts are highly inconsistent in their application of the clause and there is no clear pattern of when it is applied and when it is rejected.** The same court, sometimes on the same day, has delivered opposing rulings.

4.3.1. Samos

In Samos, lawyers from the Human Rights Legal Project defending migrants accused of smuggling started to systematically raise the exemption clause over the last several years, arguing that individuals driving boats to seek asylum should not be prosecuted in the first place. This led to the **first known acquittals on this ground of beneficiaries of international protection in June 2023 and asylum-seekers in October 2024.**

In Samos, people charged with a felony - including illegal transfer and facilitation - are tried before the Court of Appeal of the Aegean, with First and Second instance hearings held only three times a year (in February, June and October), meaning that often dozens of smuggling cases are held on the same day or same week. This has allowed for lawyers at HRLP not only to represent several defendants accused of smuggling on the same day, but to monitor the trials of other defendants charged with smuggling.

While the Samos Court of Appeal has occasionally accepted the exemption clause, its application remains highly inconsistent. The same court has acquitted and convicted defendants in nearly identical circumstances, sometimes on the same day, illustrating the arbitrariness of judicial reasoning. The outcomes often depend on whether defendants had formal refugee status at the time of trial, despite the law protecting all those seeking asylum.



Photo: Samos Court of Appeal

In **June 2023** Ali (represented by HRLP) was acquitted by the Court of Samos based on his refugee status. **This was the first known case where a Greek criminal Court accepted an objection to prosecution under the exemption clause.** The acceptance of the exemption was, however, only explicitly stated by the Public Prosecutor and the Judge during the hearing, and not written in the decision. Ali had received a positive decision on his asylum application prior to his trial. Conversely, on the same day, Hamza, whose asylum claim had been rejected, was found guilty of illegal transfer of third-country nationals and sentenced to 5 years of imprisonment⁴⁵. His conviction suggests that the refugee status of Ali was crucial to his acquittal.

Ali is a Palestinian national who fled Gaza, was arrested in Samos in January 2023 and charged with facilitation. He did not drive the boat but his phone was the one used as a GPS. One witness whose statement was used by the police to accuse Ali, testified at his trial that the police had modified his declarations and forced him to sign the statement without translating it to him. Another witness informed HRLP that he had been coerced into naming Ali as the driver, as the Samos police harassed him for days and threatened to accuse him instead.

Ali was arrested a few days after his arrival and registration as an asylum-seeker. He was first placed in administrative detention, for his irregular entry. The asylum interview was conducted at this time, before the criminal charges were pressed and without the asylum services being informed of the charges. He was recognized as a refugee prior to the first instance trial during which he was acquitted, after 6 months of pre-trial detention.

In **October 2023**, Aziz and another defendant (represented by HRLP) were acquitted on the basis of the exemption clause. Both had been granted refugee status prior to their trial, and in this case the written Court decision explicitly refers to the exemption clause⁴⁶. It is crucial to note that both defendants had been arrested in 2019, at a time where migrants accused of smuggling were not put in pre-trial detention as a general practice in Samos. Thus, in both cases, the asylum service was never informed of the criminal charges against them and proceeded normally with the examination of their asylum claims. Notably, after January 2023 there was a significant change in the practice in the Court of Samos, which started to systematically order the pre-trial detention of defendants accused of smuggling, rather than ordering their conditional release (pre-detention in 95% of smuggling cases followed by HRLP since 2023). This in turn has impacted defendants' access to asylum.

In **June 2024**, the Court reached the same conclusion and acquitted 2 defendants charged with illegal transfer.⁴⁷

45 See Chapter 5, regarding the impact of a negative asylum decision on criminal proceedings

46 Decision no. 51/2023; More information on the case can be found here : Human Rights Legal Project, Greek Court has finally ruled that refugees cannot be charged with facilitating illegal entry, 22 October 2023, <<https://www.humanrightslp.eu/post/greek-court-has-finally-ruled-that-asylum-seekers-cannot-be-charged-with-facilitating-illegal-entry>>.

47 Decision no. 23/2024.

In **October 2024**, the Court acquitted 3 defendants who were asylum seekers (two defendants were Sudanese and the third was Syrian)⁴⁸. During the hearing, the Prosecutor interrogated the defendants on the motives of their flight from their countries of origin, as if to assess if they were eligible for asylum, before accepting the exemption clause as a grounds of defence. **This marked the first known case of the exemption clause being accepted for asylum seekers.**

Wahed and Mahmoud are two nationals of Sudan. They were arrested in March 2024 in Samos and charged with the illegal transfer of third-country nationals (one as the driver of the boat and one as his assistant). During their trials, in October 2024, they explained that they faced persecution in Sudan on the basis of their ethnic origin and feared for their lives as the civil war in Sudan triggered the world's worst humanitarian crisis. The Court followed the defence and the Prosecutor's opinion and acquitted Wahed and Mahmoud on the basis of Article 3(3) of the Migration Code. Both men were granted refugee status after their acquittal.

In **February 2025**, HRLP represented three Syrian defendants before the One-Member Court, and submitted proof of their application for asylum to the court. **Despite the absence of any notable difference to the cases of October 2024, during this trial, the Court rejected the objection to prosecution under the exemption without any justification.** The three defendants were found guilty of illegal transfer of third-country nationals and sentenced to 25 years and three months, 49 years, and 9 years imprisonment respectively. They filed appeals, however the Court granted suspensive effect only for one defendant, whose wife had a residence permit in Greece. The two others are currently imprisoned awaiting their appeal trial.

In **June 2025**, in the first trials held after the Kinsa ruling, the Court acquitted eleven asylum-seekers who were prosecuted for smuggling, using their applications for asylum to justify their exemption from prosecution⁴⁹. Conversely, **Belal, a Palestinian from Gaza who was facing the same charges but who had not formally applied for asylum was found guilty and sentenced to 71 years in prison.** Like the 11 other defendants, Belal came to Greece to seek asylum, but in the absence of legal support, he had not been informed that his wish to apply for asylum must be formally registered.



Illustration: Yorgos Konstantinou for '0 years' campaign

48 Decision no. 36/2024.

49 Decisions nos. 30/2025, 48/2025, 51/2025, 52/2025, 53/2025, 54/2025, 56/2025, 57/2025.

Two days later, during appeal trials for two defendants (represented by HRLP) who had been convicted of smuggling, the decisions of the Three-Member court further exposed the inconsistent and arbitrary interpretation of the law. Ahmed and Amir are both Syrian nationals, who in two separate cases, both had admitted that they had steered the migrant boat to Greece and had been convicted for the illegal transfer of third country nationals in their first instance trials. Both had also applied for international protection from prison, prior to their first instance trials. Their appeal trials took place the same day in **June 2025**, and both men were represented by the same lawyer who used the same legal arguments before the Court, which was presided over by the same prosecutor and judges. However, **while the Court acquitted Ahmed of all charges, on the grounds that as an asylum seeker he was exempt from being prosecuted for smuggling, the Court rejected the same objection in Amir's case without any justification and reconfirmed his guilty verdict.**

In **October 2025**, despite the defence citing precedent established by the same court four months prior, the Samos Court found Tariq (represented by HRLP) guilty of illegal transfer and sentenced him to 31 years of imprisonment. During the hearing, the Prosecutor argued, contrary to the clear letter of the law, that the exemption clause applied exclusively to individuals being transported, but not to the driver of a boat, and only to those who already had been granted asylum.

Tariq and Osman were arrested on the island of Samos, charged with illegal transfer and held in pre-trial detention. They fled Sudan and worked in Turkey for some time. Once their visas expired, they risked being deported to Sudan so they fled Turkey to go to Greece. Both were threatened by smugglers and forced to drive the boats they boarded in order to reach Greece and apply for asylum. Their first instance trials took place before the One-Member Court of Samos. They were represented by the same HRLP lawyers, who used the same legal arguments and submitted proof of their application for asylum to the Court. Yet, Osman was acquitted⁵⁰ and Tariq was found guilty of illegal transfer and sentenced to 31 years of imprisonment.⁵¹ The only notable difference in both men's cases is that Osman's trial took place in June 2025 and Tariq's trial took place in October 2025.

50 Decision no. 53/2025.

51 Decision no 59/2025.

Two days later, the Samos Court found another defendant, Abdulrahman, guilty of illegal transfer, endangerment and death of several people after the migrant boat he was forced to drive capsized in harsh weather conditions, leading to the death of several migrants. With regard to the exemption clause, which was raised by the defence, the judges argued that, because Abdulrahman failed to demonstrate why he personally faced persecution in Sudan, he could not be exempt from prosecution. In doing so, the court linked the application of the exemption clause to his eligibility for asylum and engaged in an informal assessment of his protection needs. This and other cases in Samos, where **judges have taken it upon themselves to assess the validity of defendants' asylum claims before accepting the objection based on the exemption clause is a worrying trend, as criminal courts are neither legally competent nor properly trained to assess claims for international protection.**

4.3.2. Crete

Over 2025, inconsistent application of the exemption clause similar to that in Samos, has been observed in Crete. The Court of Heraklio is the only other court beside the Samos Court known to have applied the exemption clause to acquit asylum-seekers. While trials of criminalised migrants in Crete were nothing new, the number of arrests and prosecutions of alleged boat drivers in Crete escalated in 2025 as it became the Greek island with the highest number of arrivals of asylum-seekers.⁵² Due to the location of Crete, previous trials had focused mainly on the legal questions arising out of the international criminal jurisdiction in Greece for boats apprehended in international waters.

Over a hundred asylum-seekers are currently in prison, awaiting their trials for illegal transfer or facilitation, which will take place before the Court of Appeal of Crete sitting in Chania or Heraklion.

The Border Violence Monitoring Network (BVMN), in monitoring several trials throughout 2025 in Crete noted significant differences between the two locations, **as the Court in Chania systematically rejected the asylum exemption, while in Heraklion, the Court acquitted five defendants on the basis of the exemption clause.**

The exemption clause was first accepted by the Court of Heraklion on **19 July 2025**, in the case of Niom, who was represented by the Greek Council for Refugees⁵³.

52 UNHCR, Operations Data Portal, Greece Sea Arrivals Dashboard, June 2025, <<https://data.unhcr.org/en/documents/details/117649>>.

53 Decision no. 384/2025.

*Niom and his pregnant wife fled the war in Sudan. He steered the boat they boarded to reach Europe and was subsequently arrested by the Greek authorities, charged with smuggling and ordered in pre-trial detention. Niom was ultimately acquitted in his trial in July 2025, as the Court accepted the defence's argument that, as an asylum-seeker fleeing the war in Sudan, he cannot face criminal charges for driving the boat.*⁵⁴ Mustafa Ahmed, from Mataris - Sudan Solidarity Committee (Mataris), who attended dozens of trials in Crete, emphasized that Niom's acquittal had nothing to do with individual circumstances but was rather due to the presence of solidarity groups who were present in the courtroom monitoring the trial.

Case studies

On 3 September 2025, the Court of Heraklion held trials for eight defendants who were all facing charges for illegal transfer of third-country nationals. Among the eight defendants, only four Sudanese nationals were acquitted on the basis of the exemption clause. The Court referred to the current situation in Sudan and the high recognition rate of receiving refugee status for Sudanese nationals to conclude that they were exempt from prosecution as smugglers. The other defendants, who were also asylum-seekers, but from Egypt and Nigeria, were found guilty and sentenced to penalties of 10 and 25 years of imprisonment.⁵⁵

The case studies from Crete show us that **the exemption clause is applied at the discretion of the individual judges, who are improperly stepping in as asylum authorities to judge the validity of defendants' claims for international protection.** This is not only contrary to basic legal protections, such as legal certainty,⁵⁶ but also contrary to the protections afforded to refugees and asylum seekers in Greek and international law, whose claims must be assessed by properly trained and competent authorities in the Asylum Service. Letting untrained judges and prosecutors scrutinize the reasons defendants fled their home countries has also opened up smuggling trials to racist anti-migrant narratives.

Across different courts, we have repeatedly witnessed openly racist language used in the courtroom, including by judges and prosecutors, raising serious concerns regarding the impartiality of proceedings.⁵⁷ For example, in one smuggling trial in Lesbos in 2020, the judges asked the defendant from Syria, why he had not stayed to fight the war in his home country, indicating a complete (deliberate or naive) misunderstanding of the rights afforded to refugees in both Greek and international law.

54 De:Criminalize, Acquittal for Niom!, 29 July 2025, <<https://decriminalize.eu/en/acquittal-for-niom/>>..

55 BVMN, Crete Trials Monitoring - 3 September 2025, <<https://borderviolence.eu/reports/crete-trials-monitoring-3-september-2025>>.

56 Anchored in Article 5(2) of the Greek Constitution.

57 See also, Valeria Hänsel, Rob Moloney, Dariusz Firla, Rûnbîr Serkekanî, Incarcerating the Marginalized: The Fight Against Alleged 'Smugglers' on the Greek Hotspot Islands, November 2020, <<https://cpt.org/wp-content/uploads/Incarcerating-the-Marginalized-Report-20201.pdf>>.

5. Impact of Smuggling Prosecution on Access to Asylum

In addition to potentially long prison sentences, prosecution for smuggling related charges can also impact access to asylum.

The Refugee Convention, under Article 1(F) excludes individuals from being granted refugee status where there are serious reasons to believe they have committed war crimes, crimes against humanity, serious non-political crimes or acts contrary to the purposes and principles of the United Nations. This exclusion clause was designed to prevent people responsible for such crimes from benefiting from the protections afforded to the refugees under the Convention.

The clause however, has been misused by the Greek asylum services to apply to an ever increasing number of crimes, including against people charged or convicted of smuggling - despite the non-violent, not-exploitative nature of smuggling crimes, by definition. We have observed that the Greek asylum service often, and arbitrarily, suspends the issuance of decisions for people who have been accused of smuggling, but whose case has not yet gone to trial, apparently waiting to see if they are convicted before ruling if they should be excluded from receiving international protection. This suspension can have severe consequences both on the outcome of a trial and on the defendant's ability to eventually receive international protection.

5.1. Suspension of the asylum decision until decision on criminal charges

The discretionary practice of suspending asylum applications of criminal defendants lacks any legal basis under EU and Greek law. It is however not uniformly applied - once again depending on criteria such as time and location of the arrest. **Pre-trial detention significantly impacts the defendants' chances of being granted international protection because the asylum services are informed about the criminal proceedings of detained asylum seekers and are likely to suspend the issuance of their decision, even for nationals of States with a high recognition rate for asylum.** As outlined above, the refugee status of the defendant is of paramount importance to their acquittal, thus, the unfounded suspension of their asylum procedure may play a critical role in their conviction.

Even in cases where there is no conviction, the suspension of asylum claims while criminal proceedings are ongoing have long-lasting consequences. The example of Ahmed's case illustrates how **criminalisation of migration combined with structural flaws in the asylum system reinforce one another to deny and delay access to asylum.**

Ahmed, a Syrian national, arrived in Samos in September 2023, with his pregnant wife and two children. They reached the island on a boat with 45 other passengers. When they left Turkey, a smuggler was on the boat and was driving it. However, as is common practice, he left the boat halfway through, abandoning the passengers at sea. Ahmed thus had no other choice but to steer the boat. Two weeks after their arrival in Samos and their registration in the CCAC, Ahmed was arrested and charged with the illegal transfer of 48 third-country nationals, including his own wife and children. While he was held in pre-trial detention, his wife gave birth to their third child.

During Ahmed's initial trials, HRLP lawyers invoked the exemption clause. In February 2024, the One-Member Court of Samos rejected the objection to his prosecution, found Ahmed guilty and sentenced him to 49 years of imprisonment. He filed an appeal, and was conditionally released from prison until his appeal trial. Ahmed was finally acquitted of all charges in June 2025 by the Three-Member Court of Samos, who accepted the objection based on the exemption clause and ruled that, as an asylum-seeker, Ahmed could not be prosecuted under the anti-smuggling code.

While in pre-trial detention, Ahmed had requested to apply for international protection. However, his request was not formally registered until February 2024, after his first instance conviction and he and his family's asylum procedures were subsequently joined under the principle of family unity. However, while only Ahmed was facing criminal charges, the asylum services of Samos informed Ahmed's lawyers that the entire family's procedure was suspended until the conclusion of the criminal proceedings against Ahmed. As of November 2025, more than two years after their arrival in Greece, and 5 months after his acquittal, Ahmed and his family are still waiting for a decision on their asylum applications.

In the case of Ahmed, mentioned above, the **unfair accusations brought against him led to a drawn-out delay of his and his family's access to protection**. Khaled, Yousef, the 'Pylos 9' and Naser were or are still in prolonged uncertainty due to the suspension of their asylum procedures.

Case studies

Khaled and Yousef (represented by LCL) are two Sudanese nationals who were arrested in Lesbos in 2023 and accused of causing a shipwreck. They were released until their trial and lodged their asylum application shortly after arriving. Close to 100% of Sudanese nationals are granted refugee status⁵⁸, however their asylum procedures are suspended until the conclusion of the criminal proceedings. As of November 2025, their first instance trial remains to be scheduled.

58 In 2024, the recognition rate of refugee status for Sudanese nationals was 95,50%. Data retrieved from https://ec.europa.eu/eurostat/databrowser/view/migr_asydec1pc_custom_18742826/default/table

The 'Pylos 9' (represented by LCL, HRLP, and others) - the 9 men scapegoated by the Greek authorities for the Pylos massacre in Kalamata, in which approximately 650 were killed⁵⁹ - also face significant delays for their asylum procedures, in addition to the egregious violations of their most fundamental human rights. The nine men were held in pre-trial detention after being charged with causing the shipwreck, facilitation of illegal entry, and other criminal charges. They all applied for asylum from inside prison and were informed by the prison administration that their application had been forwarded to the competent asylum service. However, their claims were only registered after their acquittal. It is unclear whether the prison failed to forward the application to the appropriate authority or whether there was a decision to prevent them from accessing the asylum procedure altogether. At the time of writing, one of the Pylos 9's asylum applications was rejected and the other eight are still awaiting a decision. All nine men accused are from Egypt - a country that Greece considers to be a "safe country of origin". The exemption clause was not raised in their defence at their trial in **May 2024**, as the first objection raised to their prosecution on jurisdictional grounds, was accepted by the court and the nine were acquitted.

During Naser's pre-trial detention (represented by LCL, discussed in more detail above), the prison administration also failed to forward his application for asylum to the Greek asylum services, despite requests from his lawyer. Consequently, immediately **after his acquittal in February 2025, he was placed in administrative detention as an undocumented migrant**. He was told that he was being detained because, in the absence of an asylum application, he was illegally staying in Greece. Naser had to make a new application and was only released once his application was registered. He has now been granted refugee status.

5.2. Exclusion from Refugee Protection as Convicted Smuggler

Irrespective of the nature of their asylum claim, asylum seekers whose claims are not assessed prior to their criminal trial for smuggling face a real possibility of paying a double price: conviction in criminal proceedings as smugglers as well as the rejection of their application for international protection on exclusion grounds if found guilty.

⁵⁹ The Greek Naval Court has since then pressed criminal charges against 21 HCG officers for their responsibility in the sinking of the boat.

The practice of suspending asylum claims for the duration of the criminal proceedings thus can lead to a higher rate of conviction and as a result, lower asylum claim acceptance rates for persons who are criminalised for their own unlawful entry to Greece. This perpetuates a cruel self-fulfilling prophecy of characterising people who enter Greece without permission as criminals, not people who have the right to seek asylum.

5.3. Denied Access to Asylum Procedure Due to Lack of Information and Legal Aid

As outlined above, being able to provide documentary evidence of having received international protection or being an asylum seeker can in practice be a critical factor during smuggling trials in the few jurisdictions where the exemption clause is accepted. However, access to the asylum procedure itself is often illusory, especially for detained defendants with limited access to information and legal aid.

In smuggling related cases, **pre-trial detention of adult defendants is systematic** - for instance, the Court of Samos ordered the pre-trial detention in 95% of the smuggling cases followed by HRLP since 2023, and in 73% of the cases followed by LCL since 2020. In general, foreigners who are arrested immediately upon arrival to Greece (as is the case in most smuggling cases for boat or car drivers), do not have the necessary conditions to show a stable life outside prison (a job, family, resident address) - factors considered when deciding whether to detain people awaiting trial. Because they are detained immediately upon arrival to Greece, many do not have the opportunity to apply for asylum. While asylum applications can technically be registered from the police station during the preliminary investigation, no case has been observed where this occurred. Even when defendants mention their wish to apply for asylum before the investigative judge, it is not taken into consideration.

The majority of prison administrations also fail to inform defendants of their right to apply for asylum. **Mataris**, which provides social and legal support to approximately 300 Sudanese nationals detained in Greece on smuggling charges, confirms that defendants learn from other detainees about legal organisations, solidarity groups and lawyers that can support them. According to Mustafa Ahmed, **the solidarity between detainees is crucial for defendants to learn about their basic legal rights**. However, this information is shared informally and does not guarantee that all those charged with smuggling are informed of their right to apply for asylum from prison, that this right is respected, or that they are able to timely access legal representation. Mataris is also frequently informed by Sudanese defendants that the prison administration refuses to register their asylum application.

CPT/AMS, BVMN and Mataris all point out that in Crete, Rhodes, Lesvos and Samos, state appointed lawyers are assigned to cases immediately before or, at the earliest, a few days before the trial. With such limited time to prepare, limited or no access to interpreters to communicate with their clients, and without prior knowledge of the defendant or the case, lawyers do not have the time or resources to prepare a proper defence strategy. It is materially impossible for them to thoroughly study the case file, gather evidence, summon witnesses or collect supporting documents, such as the proof of the defendant's application for asylum. According to CPT/AMS's observations, most state-appointed lawyers only read the case file, but do not consult their clients. As observed in trials that we and partner organisations have monitored, in the best case scenario state appointed lawyers raise objections on procedural irregularities but rarely raise other objections, including the exemption clause. They sometimes ask for

mitigating circumstances to be considered, however, with such time constraints, they cannot gather useful documents such as the prison file which documents the defendant's good behaviour or attendance in school in detention. After monitoring dozens of trials in Crete, BVMN noted that, in the absence of time and resources, most state appointed lawyers provided minimal consultation and steered defendants toward plea deals. BVMN concluded that many defendants effectively lacked the opportunity to develop a defence strategy.⁶⁰

Case studies

Belal was tried before the Single Member Court of Samos in **June 2025**, following his arrest in September 2024. He is a Palestinian national from Gaza, which he can prove with multiple documents. Over 96% of Palestinian asylum-seekers are granted refugee status in Greece. His lawyer was appointed by the Court only a few days prior to his trial. During the nine months of his pre-trial detention, Belal was never informed that his wish to apply for asylum had to be formally registered. Thus, while the Court acquitted 11 defendants on the basis of the exemption clause as asylum seekers, Bilal was found guilty and sentenced to 71 years of prison for illegal transfer. His appeal, where he is represented by HRLP, is still pending.

In **September 2025**, BVMN and LCL monitored the trial of an Egyptian defendant accused of facilitation before the Court of Rhodes. While it was evident that the defendant had 'self-transported' to Greece, his lawyer, who had been state-appointed, did not say a single word in his defence during the hearing. The Court asked his lawyer whether they would like to present legal arguments, present witnesses, closing remarks, or raise any mitigating factors. All questions were answered with a single click of the tongue, indicating that the defense lawyer did not wish to speak. The lawyer immediately left the room, without even asking his client whether he wished to appeal the decision of the Court. The defendant was found guilty and sentenced to 25 years of imprisonment.⁶¹

From the foregoing it is clear that in many cases, access to seeking asylum is hindered either by the Greek detention system or by inadequate legal representation by state-provided lawyers, having a clear impact on defendants' ability to object to their prosecution as smugglers under the exemption clause.



Illustration: Peter Eickmeyer for '0 years' campaign

⁶⁰ See footnote 33.

⁶¹ BVMN, Rhodos Trials Monitoring, 7-9 October 2025, <<https://borderviolence.eu/reports/rhodos-trials-monitoring-7-9-october-2025>>.

6. Impact of Asylum Policies and Practices on Smuggling Prosecution

The exemption clause of the Migration Code applies to both refugees and asylum seekers, and the Palermo Protocol further provides that migrants cannot be prosecuted if they themselves are smuggled across a border. However, in practice we have seen that ones' legal status has an impact on the outcome of criminal proceedings. Based on cases represented by lawyers from our organisations, in the few jurisdictions where the exemption clause has been accepted, individuals who obtained refugee status before the conclusion of criminal proceedings were more likely than those who were still asylum seekers at the time of trial to have their objection to prosecution under the exemption clause accepted.

6.1. Suspension of Asylum Contributes to Rejection of Exemption Clause for Asylum Seekers

The suspension of asylum claims for criminal defendants charged with smuggling traps individuals in an absurd situation: they cannot prove their refugee status in order to invoke the exemption clause, because the asylum service is awaiting the outcome of the criminal proceedings to determine whether they are guilty of the alleged serious offence.

Adam (represented by HRLP) is a Syrian national who was arrested upon his arrival in Samos in July 2024, charged with illegal transfer and held in pre-trial detention until his first instance trial. While in pre-trial detention, Adam applied for international protection and had his asylum interview. His wife and daughter had previously come to Greece and already been granted refugee status. In line with the principle of family unity, the refugee protection granted to his spouse should have been extended to Adam, however, his application for asylum remains suspended until the conclusion of the criminal proceedings.

In his first instance trial, in February 2024, the Court of Samos found him guilty, despite having raised the exemption clause, and despite the fact that he was an asylum seeker, and sentenced him to 25 years and three months of imprisonment.⁶² As of November 2025, no appeal trial has been scheduled.

6.2. Delayed Access to Justice in Criminal Proceedings due to Administrative Delays in Asylum Cases

Case studies

In cases where asylum services do not suspend the asylum cases of criminal defendants, the usual delays and the slow processing of asylum cases in Greece can impact the defendant's criminal case. Being able to present documents in Court that someone has been recognized as eligible for international protection could significantly improve the chances that the responsible Court applies the exemption clause. Asylum Services who are slow in providing documents or in assessing asylum claims may thus force defendants to ask for a postponement of their case, contributing to unnecessary delays.

At the time of his arrest in November 2023, Omar (represented by HRLP) was still a minor. He had fled Sudan and travelled alone to Greece, via the island of Samos, to apply for asylum. Because he was an unaccompanied minor, the pre-investigative judge did not order his pre-trial detention and he was registered in a shelter for unaccompanied children. His asylum procedure took place normally. By the time of his trial, in **June 2024**, Omar had learned through his guardian that he had been granted refugee status, however he did not receive the decision. Despite requests from his lawyers, the asylum services sent Omar's decision a few hours after his trial was scheduled to start. As the positive asylum decision was crucial, the Court of Samos postponed the hearing on request of Omar's defence, to **June 2025**, when over a year later he was finally acquitted, after the exemption clause was invoked.

62 Decision no. 130/24.

Hamidullah, represented by HRLP, fled Afghanistan with his wife, Farzaneh, and their newborn baby. They arrived on the island of Samos in January 2024. Hamidullah was accused of steering the boat, arrested and charged with the illegal transfer of 41 third-country nationals, including his wife and infant, and put in pre-trial detention. In the meantime, Farzaneh was by herself in the Closed Controlled Access Centre (CCAC) in Samos with their infant, where she applied for asylum. However, due to significant delays in the asylum procedure, by the time of Hamidullah's trial in **June 2024**, she had still not been called for an interview at the asylum service. As an Afghan mother with an infant, had the asylum services duly processed her claim, Farzaneh would almost certainly have been granted refugee status by the time of the trial.⁶³ **The refugee status of the defendant's spouse is of paramount importance as, on the principle of family unity, it should be extended to her husband, the defendant.** In Hamidullah's case, while the exemption clause was not accepted, he was fortunately acquitted because the Court had doubts about his guilt. After spending six months in pre-trial detention, Hamidullah was finally reunited with his family. They have since then been recognized as refugees.

6.3. Exclusionary Asylum Policies Impact on Smuggling Prosecution

In addition to delays, criminal proceedings against asylum-seekers are influenced by exclusionary policies of the asylum service such as the application of **safe-third country** and the **safe country of origin** concepts.

Following the EU–Turkey Statement of 2016, Greece adopted a new asylum law under which migrants arriving on the Greek islands from Turkey were assessed to determine whether Turkey qualified as a “safe third country” within the meaning of the EU Asylum Procedures Directive.⁶⁴ If, after an individualised assessment, the asylum service determines that Turkey is a safe third country, the asylum application in Greece is rejected as inadmissible, and no examination of the applicant's eligibility for asylum is conducted. Since June 2021, Greek authorities have considered Turkey a safe third country for Bangladeshi, Somali, Syrian, Pakistani, and Afghan nationals, not because of any concrete protection afforded to these groups in Turkey, but seemingly because they represent the largest numbers of asylum seekers entering Greece.⁶⁵ This politically motivated decision has been repeatedly denounced.⁶⁶

63 In June 2024, the recognition rate of refugee status for Afghan nationals was 98,12%. Hellenic Republic Ministry of Migration and Asylum, Statistics, <<https://migration.gov.gr/en/statistika/>>.

64 Directive 2013/32/EU of the European Parliament and of the Council, 26 June 2013 on common procedures for granting and withdrawing international protection (recast), Article 38.

65 Hellenic Ministry of Migration and asylum, Ασφαλή τρίτη χώρα χαρακτηρίζει για πρώτη φορά η ελληνική νομοθεσία την Τουρκία. Αφορά αιτούντες άσυλο από Συρία, Αφγανιστάν, Πακιστάν, Μπαγκλαντές και Σομαλία, 7 June 2021 <<https://migration.gov.gr/asfali-triti-chora-charaktirizei-gia-proti-fora-i-elliniki-nomothesia-tin-toyrkia-afora-aitoyntes-asylo-apo-syria-afganistan-pakistan-mpagklantes-kai-somalia/>>. This decision was renewed in 2025, after the Council of State annulled the 2021 JMD.

66 See, e.g., Medico International, ELDH, ÇHD and ÖHD, What safety are they talking about?": Why Turkey cannot be considered a 'safe third country', <<https://eldh.eu/en/2023/09/expert-opinion-on-why-turkey-cannot-be-considered-as-a-safe-third-country/>>

Much like the “safe third country” concept, the designation of a “safe country of origin” under the Common European Asylum System⁶⁷ creates a presumption of safety for nationals of certain countries - one that applicants must rebut to access asylum. This concept is highly problematic, as it reinforces binary narratives of “genuine refugees” versus “unwelcome migrants,” and in practice denies protection through self-perpetuating exclusionary policies. For example, if an asylum seeker comes from a country Greece designates as “safe,” their asylum application is more likely to be rejected - a result that is then used to justify maintaining the designation itself.

When combined with criminal prosecutions for smuggling, **originating from a “safe country of origin” or passing through a “safe third country” can further undermine an asylum seeker’s chances of receiving an impartial trial.**

Case studies

Hamza (represented by HRLP), an Afghan national, was arrested in Samos in 2022 and charged with the illegal transfer of third-country nationals. His first-instance trial took place in **June 2023** before the Samos Court. Although he had applied for international protection, his claim was found inadmissible on the grounds that Turkey was considered “safe” for him. Unlike Ali, a Palestinian national tried on the same day who had been granted refugee status prior to trial, Hamza was found guilty of the illegal transfer of third-country nationals. Following his conviction for smuggling, his appeal in the asylum procedure was rejected, as Turkey was once again deemed safe for him. After this rejection, he lost his status as an asylum seeker. Consequently, during his criminal appeal trial in **October 2024**, his conviction was upheld, as the exemption clause no longer applied to him. On the same day, two other defendants were acquitted under the exemption clause, as they still held asylum-seeker status.

The impact of these exclusionary policies was again starkly illustrated in **September 2025** by the Heraklion Court in Crete, which acquitted Sudanese asylum seekers on the basis of the exemption clause, likely due to the high asylum recognition rate for Sudanese nationals, while rejecting the same objection when raised for Egyptian defendants, as Egypt is designated a safe country of origin.⁶⁸ In doing so, the court disregarded the very principle of the exemption clause which applies to all asylum seekers regardless of nationality, and the fundamental right to have an individualised asylum determination assessment.

In the *Kinsa* judgment, delivered only a few months before the Heraklion decision, the CJEU explicitly held that **asylum seekers must be exempted from criminalisation “irrespective of the prospects of such a claim,”** so long as no final decision on their application has been made. The Court emphasised that considering the potential outcome of the asylum procedure would undermine the effectiveness of the right to asylum itself.⁶⁹

67 European Parliament, ‘Safe country of origin’ concept in EU asylum law, <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/762315/EPRS_BRI\(2024\)762315_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2024/762315/EPRS_BRI(2024)762315_EN.pdf)>.

68 European Union Agency for Asylum, Who is Who in International Protection in the EU+: Countries Applying the Concept of Safe Countries in the Asylum Procedure, <<https://whoiswho.euaa.europa.eu/Pages/safe-country-concept.aspx>>.

69 Court of Justice of the European Union, C-460/23, §61.

7. Conclusion and recommendations

The findings of this report reveal a profound dissonance between Greece's legal commitments and its judicial practice. The exemption from criminalisation, intended as a safeguard for migrants, has been hollowed out by inconsistent interpretation and a punitive border regime. Greek courts routinely disregard the clear wording of Article 3(3)(e) of the Migration Code, applying it selectively and unpredictably. In the few jurisdictions where the exemption clause has been accepted at all, the decision to acquit or convict often depends on arbitrary factors such as the defendant's nationality, or the timing of their asylum procedure. Judges and prosecutors have overstepped their authority, informally assessing the merits of asylum claims within criminal trials, an approach that both undermines fair trial guarantees and reinforces exclusionary migration policy objectives. Defendants are trapped between two systems: asylum services that refuse to assess their claims until criminal cases are resolved, and criminal courts that refuse to recognise defendants' right to be exempt from prosecution until their asylum status is confirmed.

At the same time, the militarisation of EU borders have created the very conditions that force people to rely on smugglers or to steer boats themselves. The individuals criminalised under Greece's anti-smuggling framework are not traffickers or profiteers; they are survivors of systemic violence, exercising their right to freedom of movement in the only way available to them.

To end this injustice, Greece and the EU must:

- **Reform the discriminatory and exclusionary migration policies that uphold Fortress Europe, so that all people can travel and migrate where they choose.**
- **Reform anti-smuggling laws and regulations to bring them in line with the Palermo Protocol, to prevent the prosecution for smuggling when there is no material gain, and in cases where migrants are subjected to smuggling networks in order to cross borders.**
- **Ensure uniform application of the exemption clause across all jurisdictions in Greece, to exempt from prosecution all asylum seekers and refugees, in line with international obligations and the CJEU's Kinsa judgment.**
- **Ensure proper training for judges, prosecutors, and state appointed lawyers regarding migration law and its interconnection with prosecution under Greece' anti-smuggling legislation to ensure uniform application of the law and adequate legal representation.**
- **End the suspension of asylum procedures for migrants facing smuggling charges, given that smuggling is a victimless crime that does not fall within the exclusion clause of the Refugee Convention.**



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